(1) Supreme Court, U.S.
FILED

No. 00 675 OCT 26 2000

OFFICE OF THE CLERK

In The

Supreme Court of the United States

BILL JONES, Secretary of State of the State of California, and MISCHELLE TOWNSEND, Registrar of Voters of Riverside County, California,

Petitioners,

v.

MIKE SCHAEFER,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

WILLIAM C. KATZENSTEIN
County Counsel, Riverside County, California
ROBERT M. PEPPER
Principal Deputy County Counsel
3535 Tenth Street, Suite 300
Riverside, CA 92501
Telephone: (909) 955-6300

Attorneys for Petitioner, Registrar of Voters, Mischelle Townsend

BILL LOCKYER
Attorney General of the State of California
MANUEL M. MEDEIROS
Senior Assistant Attorney General
ANDREA LYNN HOCH
Lead Supervising Deputy Attorney General
LESLIE R. LOPEZ*
Deputy Attorney General
1300 I Street;
P.O. Box 944255
Sacramento, CA 94244
Telephone: (916) 327-0973

Attorneys for Petitioner Secretary of State Bill Jones

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED FOR REVIEW

Whether a State may, consistent with the Elections Clause and the Qualifications Clause, require a candidate for the United States House of Representatives to be a registered voter in, and therefore a resident of, the State prior to the date that he or she is actually elected to office.

PARTIES TO THE PROCEEDING

The parties to the Court of Appeal proceeding are as follows:

Petitioners: Bill Jones, Secretary of State of the State of California, and Mischelle Townsend, Registrar of Voters of Riverside County, California

Respondent: Mike Schaefer

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

TABLE OF APPENDICES vi

PETITION FOR A WRIT OF CERTIORARI 1

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 4

I. THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH PRIOR DECISIONS OF THE SUPREME COURT 4

II. THE QUESTION PRESENTED IS IMPORTANT 10

CONCLUSION 13

TABLE OF AUTHORITIES

Page

CASES

Dunn v. Blumstein, 405 U.S. 330 (1972) 7

Jenness v. Fortson, 403 U.S. 431 (1971) 6, 7

Marston v. Lewis, 410 U.S. 679 (1973)..... 7

Pope v. Williams, 193 U.S. 621 (1904) 7

Schaefer v. Jones, 215 F.3d 1031 (9th Cir. 2000) 5

Storer v. Brown, 415 U.S. 724 (1974) .. 4, 5, 6, 10, 11, 12

U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995) ..... *passim*

Walnut v. Wade, 103 U.S. 683 (1880)..... 7

STATUTES

Federal:

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1331..... 3

State:

Ariz. Rev. Stat. Ann. § 16-101 (1996 & 1999 Supp.) 10

Ariz. Rev. Stat. Ann § 16-311 (1996 & 1999 Supp.) 10

Cal. Elections Code § 201..... 2

Cal. Elections Code § 321..... 2

Cal. Elections Code § 6830(c) 5

Cal. Elections Code § 6830(d)..... 5

Neb. Rev. Stat. § 32-602..... 10

TABLE OF AUTHORITIES – Continued

Page

Neb. Rev. Stat. § 32-104 10

Neb. Rev. Stat. § 32-116 10

N.J. Stat. Ann. § 19:23-15 (West 1999) 10

N.M. Stat. Ann. § 1-8-18 (Michie 1995 Supp.) 10

Ohio Rev. Code Ann. Title 35 § 3503.06 (Anderson 1996) 11

Constitutions:

U.S. Constitution Art. I, § 2, cl. 2 2

U.S. Constitution Art. I, § 4, cl. 1 2

N. J. Const., Article II, § 1, ¶ 3 (West 1997) 10

Ohio Const. Art XV, § 4 (Anderson 1994) 10

TABLE OF APPENDICES

Page(s)

APPENDIX A – Opinion of the United States Court of Appeals for the Ninth Circuit, Filed June 20, 2000 ..... 1-A

APPENDIX B – Findings of Fact and Conclusions of Law, and Judgment of the United States District Court for the Central District of California, Filed February 20, 1998 ..... 18-A

APPENDIX C – Order of the United States Court of Appeals for the Ninth Circuit Denying Petition for Rehearing and Petition for Rehearing En Banc 28-A

PETITION FOR A WRIT OF CERTIORARI

Petitioner Bill Jones, Secretary of State of the State of California, respectfully petitions for a writ of certiorari to review the judgment of the Ninth Circuit Court of Appeals. Mischelle Townsend, Registrar of Voters of Riverside County, California, joins in this petition.

OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals (Appendix 1A-17A) is reported at 215 F.3d 1031 (9th Cir. 2000). The order of the Ninth Circuit denying petitioner's request for rehearing and request for rehearing en banc (App. 28A) is not reported. The judgment of the district court in and for the Central District of California (App. 18A-27A) is not reported.

STATEMENT OF JURISDICTION

The judgment of the Ninth Circuit was entered on June 20, 2000. The Ninth Circuit entered an order denying petitioner Jones' timely petition for rehearing and petition for rehearing en banc on August 1, 2000.

Petitioners invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Elections Clause (Art. I, § 4, cl. 1) and the Qualifications Clause (Art. I, § 2, cl. 2), of the United States Constitution. This case also involves sections 201 and 321 of the California Elections Code.

The Elections Clause provides as follows:

> The times, places and manner of holding elections for Senators and Representatives, shall be prescribed in each state by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators.

The Qualifications Clause provides as follows:

> No person shall be a Representative who shall not have attained to the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State in which he shall be chosen.

California Elections Code section 201 provides as follows:

> Unless otherwise specifically provided, no person is eligible to be elected or appointed to an elective office unless that person is a registered voter and otherwise qualified to vote for that office at the time that nomination papers are issued to the person or at the time of the person's appointment.

California Elections Code section 321 provides as follows:

"Elector" means any person who is a United States citizen 18 years of age or older and a resident of an election precinct at least 29 days prior to an election.

STATEMENT OF THE CASE

Respondent Schaefer sought to be a candidate in the special primary election held to fill the vacancy in California's 44th Congressional District that was created upon the death of the incumbent, Sonny Bono. (App. 2A, 19A.) Schaefer's request to receive candidacy papers was rejected because, at the time of his request, he was not registered as a California voter as is required by section 201 of the California Elections Code. (App. 2A, 19A.)

In February 1998, respondent Schaefer commenced an action in the United States District Court for the Central District of California, seeking to compel his admission as a candidate in the special election. (App. 18A.) Jurisdiction in the district court was premised upon 28 U.S.C. § 1331. Respondent claimed the state statutes requiring him to be a registered voter and, consequently, a California resident, prior to the primary election were unconstitutional under the Qualifications Clause. (App. 19A.) Following a bench trial on the merits, the district court concluded that the residency requirement was a proper regulation under the Elections Clause. (App. 26A.) Judgment was entered in favor of petitioners. (App. 27A.)

Schaefer timely appealed. In June 2000, the Ninth Circuit reversed the district court's judgment, concluding

that the residency requirement was invalid under the Qualifications Clause. (App. 5A-17A.) The Ninth Circuit subsequently denied petitioner's request for rehearing and request for rehearing en banc. (App. 28A.)

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH PRIOR DECISIONS OF THE SUPREME COURT

The decision of the Court of Appeals conflicts with *Storer v. Brown*, 415 U.S. 724 (1974), and *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995).

Requiring candidates for Congressional districts within California to be California voters is a procedural mechanism that merely implements the pre-existing mandate within the Qualifications Clause that a candidate be a permanent "inhabitant" of California when he or she is elected by California's voters to the House of Representatives. Therefore, California's manner of implementing the Qualifications Clause is a valid time, place or manner regulation under the Elections Clause within the meaning of *Storer v. Brown, supra*, 415 U.S. at 724.

The Ninth Circuit viewed California's residency requirement as falling outside the scope of *Storer* and the Court's other Elections Clause cases and, instead, concluded that the regulation was a substantive qualification that would likely handicap the class of non-resident potential candidates, rendering them ineligible for ballot

positions. *Schaefer v. Jones*, 215 F.3d 1031, 1037-38 (9th Cir. 2000), citing *Thornton, supra*, 514 U.S. at 835. In reaching its conclusion, the Court of Appeals applied *Thornton* far too broadly. Likewise, the Court of Appeals evaded the reasoning and rule of *Storer*, relegating it to only one "cf" cite. *Id.* at 1037. As a result, the Ninth Circuit's decision is in direct conflict with both *Thornton* and *Storer*.

In *Storer v. Brown, supra*, 415 U.S. at 724, petitioners Storer and Frommhagen, who wished to run as independent candidates for Congress, challenged California's "disaffiliation" requirements. Under the disaffiliation requirements, California barred any independent candidate from being placed on the ballot if he or she had voted in the immediately preceding primary ([former] Cal. Elec. Code § 6830(c)), or who had a registered affiliation with a qualified political party at any time within one year prior to the immediately preceding primary election. [Former] Cal. Elec. Code § 6830(d). *Storer v. Brown, supra*, 415 U.S. at 728. Because Storer and Frommhagen had been registered as Democrats until early 1972, their independent candidacies at the November 1972 general election were barred by the California Elections Code.

This Court, when faced with the contention that the required disaffiliation posed an additional (and thus invalid) qualification, declared the contention "wholly without merit," stating, "Storer and Frommhagen would not have been disqualified had they been nominated at a party primary or by an adequately supported independent petition and then elected at the general election. The non-affiliation requirement no more establishes an additional requirement for the office of Representative than

the requirement that the candidate win the primary to secure a place on the general ballot or otherwise demonstrate substantial community support." *Storer v. Brown*, 415 U.S. at 746, n. 16. The Court stated:

> . . . as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes. In any event, the States have evolved comprehensive, and in many respects complex, election codes regulating in most substantial ways, with respect to both federal and state elections, the time, place, and manner of holding primary and general elections, the registration and qualifications of voters, and the selection and qualification of candidates. *Id.* at 730.

Indeed, the Court found that California had "an interest, if not a duty, to protect the integrity of its political processes from frivolous or fraudulent candidacies." *Id.* at 733, citing, *Jenness v. Fortson*, 403 U.S. 431, 442 (1971). Thus, even though potential independent candidates were categorically barred from appearing on the ballot if they did not meet the disaffiliation requirements, those requirements amounted to valid time, place and manner restrictions.

Likewise, here, California's voter registration rule implements the constitutional requirement that a candidate be a permanent "inhabitant" of the state when he or she is elected to Congress.[1] Effectively implementing that

---

[1] On at least one occasion, this Court has construed the "inhabitants" of a town to mean its registered, "legal voters."

requirement is a legitimate manner of protecting the integrity of California's political processes from frivolous or fraudulent candidacies.

The voter registration requirement furthermore helps to ensure that a member of Congress who is elected from California has sufficient familiarity and contact with California in order to competently perform their duties. Of course, to be eligible to vote for congressional candidates, individuals may be required to first manifest their commitment to a particular state by timely establishing their status as a bona fide resident and registered voter. See *Marston v. Lewis*, 410 U.S. 679, 681-82 (1973) (per curiam); *Dunn v. Blumstein*, 405 U.S. 330, 333-34 (1972); *Pope v. Williams*, 193 U.S. 621, 633 (1904). Requiring candidates themselves to exhibit these basics of citizenship is nothing more than a means of confirming that the candidate likewise has a demonstrable commitment to both the state from which he or she seeks to be elected, as well as its voters. Conditioning candidacy on such a basic commitment is, likewise, one valid way of furthering the state's important interest in requiring "some preliminary showing of a significant modicum of support before printing the name of a . . . candidate on the ballot." *Jenness v. Fortson, supra*, 403 U.S. at 442. Thus, requiring a Congressional candidate to become a registered California voter does not "involve measures that exclude candidates from the ballot without reference to the candidate's support in the electoral process." *Thornton, supra*, 514 U.S.

Walnut v. Wade, 103 U.S. 683, 693-95 (1880) [interpreting Illinois statute requiring approval of bond by "inhabitants" of a town to mean approval by a majority of legal voters].

835. California's residency rule is, therefore, a valid time, place or manner regulation as authorized by the Elections Clause.

Moreover, while the Court of Appeals apparently believed it was following *Thornton, supra,* its decision is directly at odds with it because the statutory schemes are completely different in purpose and effect. The term limits statutes in *Thornton* sought to give states the power to ban incumbents from any further service in Congress. That surely "would effect a fundamental change in the constitutional framework." *Thornton,* 514 U.S. at 837. Here, however, the temporary "ban" on non-residents ends and eligibility for candidacy begins when the potential candidate becomes a registered California voter. Such a rule does not effect a fundamental change in our constitutional framework but, rather, fulfills the requirements of the Qualifications Clause.

In *Thornton,* an Arkansas constitutional provision prohibited a candidate from appearing on the general election ballot for United States Congress if he or she had already served three terms in the House of Representatives or two terms in the Senate. *Id.* at 783. Both the Arkansas Supreme Court and this Court concluded that the Arkansas law was unconstitutional as an additional qualification not authorized by the Qualifications Clause. *Id.* The Arkansas Supreme Court viewed the term limits provision as " 'an effort to dress eligibility to stand for Congress in ballot access clothing' because the 'intent and the effect of [the amendment] are to disqualify congressional incumbents from further service.' " *Id.* at 829. Given the State supreme court's interpretation of the Arkansas provision, this Court accepted that view and

concluded that the purpose of the Arkansas law was an "attempt to achieve a result that is forbidden by the Federal Constitution." *Id.* Thus, the court held a "state amendment is unconstitutional when it has the likely effect of handicapping a class of candidates and has the sole purpose of creating additional qualifications indirectly." *Id.* at 836.

Here, however, the Ninth Circuit's decision contravenes *Thornton* in at least two vital ways. First, the Ninth Circuit left unanswered an important prong of the *Thornton* test – whether the regulation "has the sole purpose of creating additional qualifications indirectly." *Id.* The term limits statute in *Thornton* worked, for all practical purposes, an absolute lifetime ban upon all persons who had served either three terms in the House or two terms in the Senate. That type of a restriction both handicaps a broad class of candidates *and* indirectly creates an additional qualification for Congressional candidates. In the instant case, no candidate is subject to a lifetime ban but, rather, he or she need only become a registered California voter by the time nomination papers are due to be filed for the primary election that the candidate plans to run in. The state statutory requirement is, therefore, not an indirect attempt to add Congressional qualifications. Rather, California's requirements are reasonable, non-discriminatory elections process regulations that serve California's important interest in guarding the integrity of its elections and preventing the appearance of frivolous or fraudulent candidates on its ballots. Moreover, there is no "substantive handicap" placed upon non-residents. Instead, being a registered California voter prior to a primary election complements the constitutional mandate

that the candidate be a permanent inhabitant of the State when elected.

Second, the Court of Appeals overlooked a critical, but missing, element from *Thornton* – there is no California Supreme Court interpretation of the residency provisions as constituting a "disqualification from further service" for nonresidents or any other attempt to indirectly achieve a constitutionally prohibited end. Indeed, California's residency requirements cannot be read as a "disqualification from further service." Under California's statutory scheme, appellant Schaefer, as well as other current nonresidents, are free to mount a candidacy to be elected to Congress from California so long as he or she is a registered California voter by the time he or she files nomination papers. That, however, does not rise to the level of "a fundamental change in the constitutional framework." *Thornton*, 514 U.S. at 837.

Consequently, the Court of Appeals decision conflicts with at least two Supreme Court cases because it applies *Thornton* too broadly and, in the process, undermines *Storer*.

II. THE QUESTION PRESENTED IS IMPORTANT

The issue presented in this case is important because several other states have statutory residency requirements similar to California's.[2] To date, no other Circuit

---

[2] See, e.g., Ariz. Rev. Stat. Ann. §§ 16-101, 16-311 (1996 & 1999 Supp.); Neb. Rev. Stat. §§ 32-602, 32-104, 32-116; N.J. Const., Art II, § 1, ¶ 3 (West 1997) and N.J. Stat. Ann. § 19:23-15 (West 1999); N.M. Stat. Ann. § 1-8-18 (Michie 1995 Supp.); Ohio

Court of Appeals has decided this issue. Consequently, without guidance from this Court, the Ninth Circuit's decision could have far reaching impacts because there is no way to discern from the Court of Appeals' decision where a regulation crosses the line from being a valid Elections Clause regulation and, instead, becomes invalid as being in conflict with the Qualifications Clause.

Unless this important question is settled, the integrity of the electoral processes of California, as well as other states, could be frustrated by the appearance of frivolous or fraudulent candidates on its ballots, a circumstance which could lead to frustration of the democratic process. In order to ensure the seriousness of candidates, the integrity of the party nomination process, and to limit the frustration and size of the ballot (see, *Storer, supra,* 415 U.S. at 731-36), states must be able to properly subject Congressional nominees to various nomination *procedures,* such as voter registration and residency. Such procedural regulations are consistent with both the Elections Clause and the Qualifications Clause. Indeed, as mentioned above, this Court has recognized that there *must* be substantial regulation of elections. *Storer, supra,* 415 U.S. at 730.

California's requirement that Congressional candidates be registered California voters is a mechanism to implement the pre-existing constitutional requirement that a candidate be a permanent "inhabitant" of the State

---

Const. Art XV, § 4 (Anderson 1994) and Ohio Rev. Code Ann. Title 35 § 3503.06 (Anderson 1996).

when he or she is elected to Congress. California's residency requirement is also similar to *Storer's* disaffiliation rule because neither rule prohibits the potential candidate from appearing on a future ballot after the candidate satisfies the procedural prerequisites. California's procedural mechanisms certainly serve the State's interest in protecting the integrity and regularity of its election processes – an interest which this Court explicitly views as being independent from an indirect attempt to elude the Qualifications Clause. *Thorton, supra,* 514 U.S. at 835.

The Ninth Circuit's decision will likely lead to confusion because of its misreading of *Thornton* and its avoidance of *Storer.* At present, there is no test to discern where the Elections Clause authority to regulate the electoral process ends and where the proscriptions of the Qualifications Clause begin. In the meantime, the integrity of the electoral processes of the states could be frustrated by the appearance of frivolous or fraudulent candidates on their ballots, a circumstance which could lead to frustration of the democratic process.

Whether a requirement that a candidate for Congress be registered to vote in the state in which the candidate is running constitutes a valid regulation within the Elections Clause, rather than an invalid additional qualification is, therefore, an important question that must be settled by this Court. Without this question being settled, California and other states will be left to guess at what, if any, procedures they may impose on Congressional candidates in order to adequately and effectively protect the integrity of their election processes.

CONCLUSION

For the reasons set forth above, a petition for writ of certiorari should be granted.

Respectfully submitted,

BILL LOCKYER
Attorney General of the
State of California
MANUEL M. MEDEIROS
Senior Assistant Attorney General
ANDREA LYNN HOCH
Lead Supervising Deputy
Attorney General
LESLIE R. LOPEZ*
Deputy Attorney General
1300 I Street; P.O. Box 944255
Sacramento, CA 94244
Telephone: (916) 327-0973

WILLIAM C. KATZENSTEIN
County Counsel Riverside County,
California
ROBERT M. PEPPER
Principal Deputy County Counsel
3535 Tenth Street, Suite 300
Riverside, CA 92501

Attorneys for Petitioners

**Counsel of Record*

APPENDIX A – OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED JUNE 20, 2000

United States Court of Appeals,
Ninth Circuit.

Michael SCHAEFER, Plaintiff-Appellant,

v.

Mischelle TOWNSEND, Registrar of Voters, County of Riverside; Bill Jones, Secretary of State, State of California, Defendants-Appellees.

No. 98-55718.

Argued and Submitted Nov. 4, 1999
Filed June 20, 2000

Michael Schaefer (pro se) Las Vegas, Nevada, for the plaintiff-appellant.

Linda Cabatic, Paul Dobson, and Marsha A. Bedwell (argued), Deputy Attorneys General, Sacramento, California, for defendant-appellee Bill Jones.

William Katzenstein, Robert Pepper, Lucy Furuta, County of Riverside, Riverside, California, for defendant-appellee Mischelle Townsend.

Appeal from the United States District Court for the Central District of California; Robert J. Timlin, District Judge, Presiding. D.C. No. CV-98-00033-RT.

Before: PREGERSON, NOONAN, and O'SCANNLAIN, Circuit Judges.

O'SCANNLAIN, Circuit Judge:

We must decide whether California may require that candidates for the United States House of Representatives reside in the state when filing nomination papers, as distinguished from when elected.

I

Michael Schaefer, a Nevada resident, sought to file as a candidate in the special Congressional election of April 7, 1998 to fill the vacancy for the 44th Congressional District of California. The seat was previously held by the late Congressman Sonny Bono who died while in office. Mischelle Townsend, the Registrar of Voters for Riverside County, refused to give Schaefer the required nomination papers because he was not registered to vote in California as required by California Elections Code § 201. Under Section 321 of that code, Schaefer could not register to vote without first establishing residency in California. He refused to become a resident until elected.

Schaefer filed a complaint in the United States District Court for the Central District of California against Townsend and Bill Jones, the Secretary of State (collectively, "California") seeking a declaration of his rights and the issuance of an injunction compelling his admission to official candidacy. Schaefer alleged that, by requiring a candidate to reside in California before the election, the state enlarged upon the exclusive qualifications for members of the United States House of Representatives in violation of the Constitution. Following a stipulated bench trial, the district court entered judgment in favor of California. The district court found that Section 201 did not act as an "absolute and permanent bar to a particular class of candidates" and therefore did not violate Schaefer's First and Fourteenth Amendment rights.

Schaefer filed this timely appeal.

II

We must first decide whether this case is moot. California argues that because the contended seat has been filled, the controversy has been rendered moot and this court lacks jurisdiction to hear Schaefer's constitutional challenge. Generally, a case is rendered moot "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Powell v. McCormack*, 395 U.S. 486, 496, 89 S.Ct. 1944, 23 L.Ed.2d 491 (1969); *see also Alaska Center For Environment v. U.S. Forest Service*, 189 F.3d 851, 854 (9th Cir.1999). When the case is "capable of repetition, yet evading review," however, the fact that the court cannot give Schaefer the full relief he sought will not render the case moot. *Dunn v. Blumstein*, 405 U.S. 330, 333 n. 2, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972) (quoting *Moore v. Ogilvie*, 394 U.S. 814, 816, 89 S.Ct. 1493, 23 L.Ed.2d 1 (1969)). Although the election has passed, Schaefer's claim is capable of repetition because in the future California would deny him or any other nonresident the right to file a declaration of candidacy. The short span of time between the filing deadline and the election makes such a challenge evasive of review.

California argues that this case does not come within this exception because Schaefer has demonstrated no likelihood of running for office in that state in the future. Schaefer refuses to disclose his intentions, but argues that his political aspirations are irrelevant in evaluating the mootness exception. California cites *Thorsted v. Munro*, 75 F.3d 454 (9th Cir.1996), for the proposition that we should examine Schaefer's intentions regarding future candidacy. In *Thorsted*, we observed that the candidate's claim was not rendered moot because the allegations in

his complaint indicated "his intent to seek reelection in the future." *Id.* at 456 (parenthesis omitted). The court never stated, however, that only when a candidate plans to seek reelection is the case not moot. The capable-of-repetition prong should not be construed as narrowly as California suggests. *See Dunn*, 405 U.S. at 333 n. 2, 92 S.Ct. 995. In *Dunn*, plaintiff Blumstein had been denied the right to vote because he had not resided in the state long enough to meet the durational residency requirements. *See id.* at 331, 92 S.Ct. 995. In an action challenging the residency requirements, the Supreme Court determined that the case was not rendered moot by the fact that he had by then resided in the jurisdiction long enough to vote in the next election. *See id.* at 331-32, 92 S.Ct. 995. The Court reasoned that "the laws in question remain on the books, and Blumstein has standing to challenge them as a member of the class of people affected by the presently written statute." *Id.* at 333 n. 2, 92 S.Ct. 995. In *Joyner v. Mofford*, 706 F.2d 1523, 1527 (9th Cir.1983), we followed Dunn stating: "If [election law] cases were rendered moot by the occurrence of an election, many constitutionally suspect election laws . . . could never reach appellate review." Both Dunn and Joyner proceeded to the merits without examining the future political intentions of the challengers. Schaefer's challenge is capable of repetition, yet evades review and is therefore not moot.[1]

---

[1] For the same reasons, we reject California's suggestion that the case is moot because Schaefer later filed candidacy papers for a different office listing his residence as California. California acknowledges that when Schaefer attempted to file nomination papers for the election at issue here, Townsend

III

The Qualifications Clause of the Constitution sets forth the requirements for membership in the United States House of Representatives:

> No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

U.S. CONST. art. I, § 2, cl. 2.

California law requires that a candidate for elected office reside in the state at the time nomination papers are filed with the Registrar of Voters (i.e., prior to the election). Section 201 provides:

> Unless otherwise specifically provided, no person is eligible to be elected . . . unless that person is a registered voter and otherwise qualified to vote for that office at the time that nomination papers are issued to the person. . . .

Cal. Elec.Code § 201. California law ordinarily requires candidates to file nomination papers more than 83 days before the election. *See* Cal. Elec.Code §§ 8021, 8403.[2] Moreover, in order to be a registered voter, an

---

rejected the documents because Schaefer was not a resident of California at the time. That the election has passed or that Schaefer may have since moved to California does not render the case moot.

[2] California argues that Schaefer would have been required to maintain a state residence for 43 days prior to this election.

individual must be "a resident of an election precinct at least 29 days prior to an election." Cal. Elec.Code § 321. In contrast, the Qualifications Clause requires only that "when elected, [the Representative] be an Inhabitant of that State in which he shall be chosen." U.S. Const. art. I, § 2, cl. 2 (emphasis added). Schaefer claims that California's requirement amounts to an unconstitutional addition to the Qualifications Clause.

We take guidance from the Supreme Court's most recent examination of the Qualifications Clause, *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 115 S.Ct. 1842, 131 L.Ed.2d 881 (1995). In *Term Limits*, the Court considered a challenge to an amendment to the Arkansas state constitution which imposed term limits on the state's congressional delegation. Section 3 of Amendment 73 provided that, after being elected to three or more terms in the House of Representatives or the Senate, a person "shall not be certified as a candidate and shall not be eligible to have his/her name placed on the ballot for election. . . ." *Id.* at 784, 115 S.Ct. 1842. Testing the constitutionality of Section 3, the Court first inquired "whether the Constitution forbids States to add to or alter the qualifications specifically enumerated in the Constitution." *Id.* at 787, 115 S.Ct. 1842. To answer this question, the Court turned

---

We observe, however, that this was an emergency election and that the required period of residency could be significantly longer in a normal election. *See*, e.g., Cal. Elec.Code § 8021 (requiring that primary party nominees deliver nomination documents to the elections official 83 days before the primary election); Cal. Elec.Code § 8403 (requiring that independent nominees deliver nomination documents to the elections official 88 days before the election).

to its prior resolution of a similar issue addressed years earlier in *Powell*: "whether Congress has the power to add to or alter the qualifications of its members." *Term Limits*, 514 U.S. at 787, 115 S.Ct. 1842. The *Powell* Court held "that in judging the qualifications of its members Congress is limited to the standing qualifications prescribed in the Constitution." 395 U.S. at 550, 89 S.Ct. 1944. The Court based its holding on the relevant historical materials surrounding the Qualifications Clause and on the egalitarian notion " 'that the people should choose whom they please to govern them.' " *Id.* at 547, 89 S.Ct. 1944 (quoting 2 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 257 (Jonathan Elliot ed. 1876) (Alexander Hamilton, New York)).

After reaffirming the holding in *Powell*, the *Term Limits* Court proceeded to determine whether the States had the power to add qualifications. *See* 514 U.S. at 798, 115 S.Ct. 1842. The Court first noted that such power could not have been reserved to the States under the Tenth Amendment[3] as no federal government existed until the Constitution was ratified; the Tenth Amendment, therefore, could not have reserved a power to qualify delegates to a congressional body which did not yet exist. *See id.* at 800-03, 115 S.Ct. 1842. Concluding that the right to elect federal representatives was a "new right, arising from the Constitution itself," the *Term Limits* Court then examined additional historical evidence specifically addressing the preclusion of States' power to

---

[3] "The powers not delegated to the united states [sic] by the constitution [sic], nor prohibited by it to the states, are reserved to the states respectively, or to the people." U.S. CONST. amend. X.

qualify congressional delegates. *See id.* at 805, 115 S.Ct. 1842. Despite the fact that "term limits or 'rotation' was a major source of controversy[, t]he draft of the Constitution that was submitted for ratification contained no provision for rotation." *Id.* at 812, 115 S.Ct. 1842. The Court was especially persuaded by "the Framers' wariness over the potential for state abuse" and the need for national uniformity. *Id.* at 811, 115 S.Ct. 1842. Over a powerful dissent written by Justice Thomas and joined by three other justices, the Court concluded "that the Framers intended the Constitution to be the exclusive source of qualifications for Members of Congress, and that the Framers thereby 'divested' States of any power to add qualifications." *Id.* at 800-01, 115 S.Ct. 1842.

We begin the inquiry at hand bound by *Term Limits:* California does not "possess the power to supplement the exclusive qualifications set forth in the text of the Constitution." *Id.* at 827, 115 S.Ct. 1842. Therefore, we must determine whether the residence requirements of Sections 201 and 321 constitute an additional qualification precluded by the Constitution.

Term Limits again provides guidance. The Court held that a state provision creating an absolute bar to candidates, who otherwise meet the requirements of the Qualifications Clause, is unconstitutional. *See id.* at 828, 115 S.Ct. 1842. Although the amendment challenged in *Term Limits* merely prevented candidates' names from being printed on the ballot and did not create an absolute bar, it was "an indirect attempt to accomplish what the Constitution prohibits Arkansas from accomplishing directly." *Id.* at 829, 115 S.Ct. 1842. Thus the Court also held that "a state amendment is unconstitutional when it has the

likely effect of handicapping a class of candidates and has the sole purpose of creating additional qualifications indirectly." *Id.* at 836, 115 S.Ct. 1842.

Term Limits thus introduces two inquiries which we must pursue in determining whether the requirements imposed by Sections 201 and 321 are unconstitutional additional qualifications. First, we ask whether the California statutes create an absolute bar to candidates who would otherwise qualify under the Qualifications Clause. If they do not, we next ask whether they have the likely effect of handicapping an otherwise qualified class of candidates.[4]

The district court found that California's residency requirements did not create a "permanent and absolute bar" to Schaefer's candidacy. The district court, however, failed to continue the inquiry required by *Term Limits*. The court should have proceeded to determine whether

---

[4] The exact rule from *Term Limits* asks whether the state provision "has the likely effect of handicapping a class of candidates and has the sole purpose of creating additional qualifications indirectly." *Term Limits*, 514 U.S. at 836, 115 S.Ct. 1842. We do not construe the phrases "likely effect of handicapping a class of candidates" and the "sole purpose of creating additional qualifications indirectly" as two distinct elements. The *Term Limits* Court stated that "[o]ur cases . . . provide little support for the contention that a state-imposed ballot access restriction is constitutional when it is undertaken for the twin goals of disadvantaging a particular class of candidates and evading the dictates of the Qualifications Clauses." *Id.* at 835, 115 S.Ct. 1842. Thus, in determining whether the statutes handicap a class of candidates, we simultaneously determine whether the statutes have the sole purpose of creating an additional qualification.

California's election laws act as an additional qualification indirectly by handicapping the class of nonresident candidates.

Are nonresident candidates a class of Constitutional concern? To answer this inquiry, we turn to the language of the Qualifications Clause as well as to the relevant historical material surrounding its adoption. In the clause, the Founders simply specified that a Representative be an "Inhabitant of that State" when elected. U.S. Const. art. I, § 2, cl. 2.[5] This specific time at which the Constitution mandates residency bars the states from requiring residency before the election.

History supports this construction. The Framers discussed and explicitly rejected any requirement of in-state

---

[5] The records of the federal convention reveal the framers' deliberate selection of the word "inhabitant." The original term was "resident." 2 RECORDS OF THE FEDERAL CONVENTION 216 (M. Farrand Ed.) (1911), *reprinted in* 2 THE FOUNDERS' CONSTITUTION at 71 (Philip B. Kurland & Ralph Lerner Eds.) (1987) (Hereinafter Founders). Roger Sherman (Connecticut) moved to strike "resident" replacing it with "inhabitant." *Id.* He reasoned that latter term was "less liable to misconstruction." *Id.* James Madison (Virginia) seconded the motion agreeing that "both were vague, but the latter is least so in common acceptation, and would not exclude persons absent occasionally for a considerable time on public or private business." *Id.* He wished to avoid the abuses in construing the term "resident" that had occurred in Virginia. *See id.* Gouverneur Morris (Pennsylvania) and John Francis Mercer (Maryland) agreed reporting disputes that erupted in New York and Maryland over the term "resident." *See id.* No issue regarding the possible distinction between the Framers' use of the word "inhabitant" and the California residence requirement is raised by this case, and for present purposes we view them as interchangeable.

residency before the election. The Records of the Federal Convention show that the Framers intended to preclude any further requirement of residency prior to the date of election. Debate on the matter of an in-state residency requirement was touched off when John Rutledge (South Carolina) proposed a seven-year requirement. *See* FOUNDERS at 71. Others thought a one-year or three-year period sufficient. *See id.* George Read (Delaware), opposing any period of previous residence, "reminded [Mr. Rutledge] that we were now forming a Natil. Govt. and such a regulation would correspond little with the idea that we were one people." *Id.* James Wilson (Pennsylvania) concurred. *See id.* Mercer suggested that "such a regulation would present a greater alienship among the States than existed under the old federal system. It would interweave local prejudices & State distinctions in the very Constitution which is meant to cure them." *Id.* Hugh Williamson (North Carolina) opined that "[n]ew residents if elected will be most zealous to Conform to the will of their constituents, as their conduct will be watched with a more jealous eye." *Id.* at 72. Still others argued against the in-state residency requirement for other reasons. Madison suggested that the newly formed States in the West could not have representation if the Constitution included a residency requirement. *See id.* at 71. Wilson was concerned that legislators residing at the seat of Congress would be disqualified for not residing in their state. *See id.* Those favoring the restriction expressed concern that a nonresident would not have adequate familiarity with the affairs of the state represented. *See id.* at 71-72. The delegates voted down in turn three-year and one-year requirements of in-state residence. *See id.* at 72. The

Framers thus drafted the Constitution having explicitly rejected any residency requirement. It would appear then that California law imposes the very requirement that the Framers purposefully excluded from the Constitution. Concluding that nonresident candidates are a class of constitutional concern, we next inquire whether California's residency requirement handicaps the class.

California requires that candidates register to vote before filing nomination papers. *See* Cal. Elec.Code § 201. Registering to vote, in turn, requires candidates to complete a registration form and to reside in the state. *See* Cal. Elec.Code § 321. Filing the registration form is justified by the state's right to maintain order in its elections proceedings. Cf. *Storer v. Brown*, 415 U.S. 724, 730, 94 S.Ct. 1274, 39 L.Ed.2d 714 (1974) ("there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes"). On the other hand, requiring that candidates establish in-state residency well in advance of the election is not so justified. The course of the campaign from the time of filing, through the primary, and on to election day requires nonresident candidates to maintain in-state residence for a period of several weeks to months. Such a requirement hampers nonresident candidates with homes, families and jobs in another state. The burdens created by the residency requirement may very well deter candidates from running for Congress. Furthermore, California's residency requirement burdens the entire pool of out-of-state candidates, whereas the Constitution only requires in-state

residency of one, the victor. We therefore hold that California's requirement that candidates to the House of Representatives reside within the state before election, violates the Constitution by handicapping the class of nonresident candidates who otherwise satisfy the Qualifications Clause.

IV

California argues that the residency requirement is sustained by its power to regulate the procedural aspects of federal elections granted by U.S. CONST. art. I, § 4, cl. 1: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof." California contends that under the Elections Clause it is not limited squarely to regulating times, places and manner; rather, it has the power to adopt "generally-applicable and evenhanded restrictions that protect the integrity and reliability of the electoral process itself." *Anderson v. Celebrezze*, 460 U.S. 780, 788 n. 9, 103 S.Ct. 1564, 75 L.Ed.2d 547 (1983).

Prior to *Term Limits*, when faced with a viable Elections Clause argument, the Supreme Court commonly employed a balancing test, weighing the state's interests against the rights of candidates and voters, to measure the constitutionality of a challenged ballot access provision. *See id.*, at 789, 115 S.Ct. 1842 (outlining the balancing test[6]); *see also Burdick v. Takushi*, 504 U.S. 428, 433-34, 112

---

[6] "[The court] must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to

S.Ct. 2059, 119 L.Ed.2d 245 (1992) (reaffirming *Anderson* and recognizing that severe restrictions on the rights of candidates and voters are subject to strict scrutiny); *Bates v. Jones*, 131 F.3d 843, 846 (9th Cir.1997) (employing the *Anderson* test in upholding term limits for California state legislators). Accordingly, California invites us to balance its interests in maintaining the integrity of its ballot against the burden that its election laws place on nonresident candidates.

The *Term Limits* Court rejected such a broad reading of the Elections Clause and held the balancing test inapplicable where the challenged provision supplemented the Qualifications Clause and did not regulate a procedural aspect of an election or require a candidate to show a minimum level of support before running. The Court noted that: "The provisions at issue in . . . our . . . Elections Clause cases were thus constitutional because they regulated election procedures and did not even arguably impose any substantive qualification rendering a class of potential candidates ineligible for [a] ballot position." 514 U.S. at 835, 115 S.Ct. 1842. The Court distinguished other Elections Clause cases on the ground

---

vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests; it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional." *Anderson*, 460 U.S. at 789, 103 S.Ct. 1564.

that "they did not involve measures that exclude candidates from the ballot without reference to the candidates' support in the electoral process." *Id.*

Likewise, California's residency requirement falls outside the scope of Elections Clause cases because it neither regulates the procedural aspects of the election nor requires some initial showing of support. California argues that the residency requirement is a procedural regulation furthering its interest in protecting its ballot from nonresident candidates who, upon winning the election, might fail to establish residence and thus force an emergency election to fill the seat. The Supreme Court has indeed recognized a state's interest "in avoiding confusion, deception, and even frustration of the democratic process at the general election." *Jenness v. Fortson,* 403 U.S. 431, 442, 91 S.Ct. 1970, 29 L.Ed.2d 554 (1971). The Court has upheld various state provisions pursuing this interest. *See,* e.g., *Roudebush v. Hartke,* 405 U.S. 15, 24-25, 92 S.Ct. 804, 31 L.Ed.2d 1 (1972) (upholding Indiana's authority to conduct a recount of the vote in an election to the United States Senate); *Marston v. Lewis,* 410 U.S. 679, 681-82, 93 S.Ct. 1211, 35 L.Ed.2d 627 (1973) (upholding a 50-day voter registration cut-off for the election of state and local officials). California's residency rule, however, is not merely a procedural regulation; it "impose[s][a] substantive qualification [i.e., residency] rendering a class of potential candidates [i.e., nonresidents] ineligible for ballot positions." *Term Limits,* 514 U.S. at 835, 115 S.Ct. 1842. It contravenes the express language of the Qualifications Clause and thus extends far beyond any procedural requirement previously

upheld, cutting deep into the rights of nonresident candidates and the voters who seek to associate with them: "The power to regulate the time, place, and manner of elections does not justify, without more, the abridgment of fundamental rights. . . . " *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 217, 107 S.Ct. 544, 93 L.Ed.2d 514 (1986).

Furthermore, the residency requirement is not a provision "requiring some preliminary showing of a significant modicum of support." *Jenness*, 403 U.S. at 442, 91 S.Ct. 1970 (upholding Georgia's requirement that minor party candidates file a nominating petition signed by at least five percent of eligible voters in order to have their names placed on general election ballots); *see also American Party of Texas v. White*, 415 U.S. 767, 782-83, 94 S.Ct. 1296, 39 L.Ed.2d 744 (1974) (upholding part of a Texas statute requiring signatures from one percent of the vote from the previous gubernatorial election); *Andress v. Reed*, 880 F.2d 239, 241 (9th Cir.1989) (upholding California elections law which required payment of a $1,502 fee or submission of 10,000 supporting signatures). While California has the power to exclude candidates who cannot muster a preliminary showing of support, and could protect the interests it asserts here by so doing, it does not have the power to require residency prior to the time appointed by the Constitution. This is not to say, however, that California could not require candidates to file a document with their nomination papers attesting that they will be inhabitants of the state when elected. Consistent with *Term Limits*, we hold that because California's residency requirement as it applies to candidates for the United States House of Representatives handicaps a class

of candidates and falls outside the sphere of Elections Clause cases.

V

The California residency requirement has the likely effect of handicapping the class of nonresident candidates who would otherwise meet the requirements of the Qualifications Clause. Therefore, because states do not have the power to add to or alter the requirements enumerated in the Qualifications Clause, Section 201 of the California Elections Code is unconstitutional insofar as it requires candidates for the state's delegation to the House of Representatives to reside in the state prior to the election.

REVERSED.

APPENDIX B – FINDINGS OF FACT AND CONCLUSIONS OF LAW, AND JUDGMENT OF THE UNITED STATES DISTRICT COURT OF THE CENTRAL DISTRICT OF CALIFORNIA, FILED FEBRUARY 20, 1998

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

MIKE SCHAEFER, Plaintiff, v. MICHELLE [sic] TOWNSEND, Registrar of Voters, BILL JONES, Secretary of State, Defendants.	ED CV 98-0033 RT (VAPx) FINDINGS OF FACT AND CONCLUSIONS OF LAW (Filed Feb. 20, 1998)

I.

Procedural Background

Plaintiff Mike Schaefer ("Schaefer") in his complaint seeks declaratory relief, a writ of mandate, and injunctive relief against Michelle [sic] Townsend, the Registrar of Voters for Riverside County ("Townsend") and Bill Jones, the Secretary of State for the State of California ("Jones") (hereinafter collectively "Defendants"). The complaint seeks a ruling on the constitutionality of Section 201 of the California Elections Code ("Section 201")[1] which provides as follows:

---

[1] At the hearing on the Order to Show Cause why such declaratory relief should not be granted, ("OSC"), Schaefer stated that the sole constitutional challenge brought by his complaint was to Elections Code Section 201 in its application to him.

> "Unless otherwise specifically provided, no person is eligible to be elected or appointed to an elective office unless that person is a registered voter and otherwise qualified to vote for that office at the time that nomination papers are issued to the person or at the time of the person's appointment."

Schaefer contends that Townsend's citing of Section 201 as a reason for her refusal to issue to him nomination papers as a candidate for the special election to fill the existing vacancy in the 44th U.S. Congressional District is unconstitutional because Section 201 adds a qualification to the office of a United States Representative and is therefore, unconstitutional in its application to him under Article I, Section 2, Clause 2 of the United States Constitution ("Qualifications Clause").[2] Defendants contend that this requirement is not a qualification, but a permissible regulation of the time, place, or manner of an election allowed under Article I, Section 4, Clause 1 of the United States Constitution ("Elections Clause").[3]

At the hearing on the OSC, the parties stipulated that the court may make Findings of Fact and Conclusions of

---

[2] Article I, § 2, cl. 2, which applies to the U.S. House of Representatives, provides: "No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen."

[3] Article I, § 4, cl. 1 provides: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof: but the Congress may at any time by Law make or alter such Regulations, except as to the Places of ch[oo]sing Senators."

Law and enter a final judgment on the declaratory relief claim.

II.

Findings of Fact

Schaefer is a resident of Nevada. He seeks to be a candidate in the forthcoming special Congressional election to fill the existing vacancy for the 44th Congressional District seat in Riverside County, California. When Schaefer requested nomination papers from Townsend, Registrar of Voters for Riverside County, she refused to give him such papers unless he was "a registered voter of California at the time nomination documents are issued." Pl. Decl. at ¶ 1.

III.

Conclusions of Law

Schaefer's claim seeking a writ of mandate is not a legally available claim in a federal district court.

Section 201 provides that "no person is eligible to be elected or appointed to an elective office unless that person is a registered voter and otherwise qualified to vote for that office at the time that nomination papers are issued to the person or at the time of the person's appointment." In order to be a registered voter an individual must be a resident of an election precinct at least 29 days prior to an election.[4] Elections Code section 321.

---

[4] State regulations that require an individual to be a resident of a state in order to vote in an election have long been held constitutional. *Pope v. Williams,* 193 U.S. 621, 24 S.Ct. 573

Section 201 is not a qualification for the office of United States Representative as defined by the Supreme Court. The Supreme Court in *U.S. Term Limits v. Thornton*, 514 U.S. 779, 115 S.Ct. 1842 (1995), held that an amendment to the Arkansas State Constitution which precluded persons who had served a certain number of terms in the United States Congress from having their names placed on later ballots for election to Congress was an unconstitutional additional qualification for the office of U.S. Representative. The Court held that the Arkansas term limits amendment was an additional qualification and not a regulation because term limits act as an automatic disqualification which permanently prevents candidates from running for Congressional office who have served a particular number of terms. *Id.* at 828-30, 115 S.Ct. 1867-68. Although the Court recognized in its decision that the States were empowered under the Elections Clause to regulate elections, it stated that the Elections Clause does "not provide States with license to exclude classes of candidates from federal office." *Id.* at 832, 115 S.Ct. at 1869. Therefore, any state regulation that acts as a permanent and absolute bar to a particular class of candidates is viewed as an additional qualification for office.

Section 201 in its application to Schaefer is not a permanent and absolute bar to his being a candidate for the office of United States Representative because he falls within a particular class of candidates.

(1904). In addition, durational residency requirements that require an individual to be a resident of a state for a period of less than thirty days in order to eligible to [sic] vote in an election are also constitutional. *Dunn v. Blumstein*, 405 U.S. 330, 92 S.Ct. 995 (1971).

The Supreme Court has recognized that a state, pursuant to its powers under the Elections Clause, can enforce restrictions on who may be eligible to run for a certain office. *Anderson v. Celebreeze*, 460 U.S. 780, 788, 103 S.Ct. 1564, 1570 (1983); *Jenness v. Fortson*, 403 U.S. 431, 91 S.Ct. 1970 (1971); *American Party of Texas v. White*, 415 U.S. 767, 94 S.Ct. 1296 (1974). In doing so, the Supreme Court has recognized that "there must be substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos is to accompany the democratic processes." *Storer v. Brown*, 415 U.S. 724, 730, 94 S.Ct. 1274, 1279 (1974).

Section 201 acts as a regulation, by the state pursuant to its powers under the Elections Clause, of an individual's eligibility to be a candidate for an elective office.

In analyzing state eligibility requirements for candidates, the Supreme Court has noted that "it is essential to examine in a realistic light the extent and nature of their impact on voters," *Bullock v. Carter*, 405 U.S. 134, 143, 92 S.Ct. 849, 856 (1972), because "laws that affect candidates always have at least some theoretical, correlative effect on voters." *Anderson v. Celebreeze*, 460 U.S. at 786, 103 S.Ct. at 1568 (citing *Bullock*, 405 U.S. at 143, 92 S.Ct. at 856). "The impact of candidate eligibility requirements on voters implicates basic constitutional rights." *Id.* The Supreme Court has found that candidate eligibility requirements burden "the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters . . . to cast their votes effectively." *Williams v. Rhodes*, 393 U.S. 23, 30-31, 89 S.Ct. 5, 10 (1968).

Recognizing that voting rights are fundamental, the Supreme Court has opined:

> "not all restrictions imposed by the States on candidates' eligibility for the ballot impose constitutionally suspect burdens on voters' rights to associate or to choose among candidates. . . . To achieve these necessary objectives, States have enacted comprehensive and sometimes complex election codes. Each provision of these schemes, whether it governs the registration and qualifications of voters, the selection and eligibility of candidates, or the voting process itself, inevitably affects – at least to some degree – the individual's rights to vote and his right to associate with others for political ends. Nevertheless, the State's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions." *Anderson*, 460 U.S. at 788, 103 S.Ct. at 1569-70.

A court considering a challenge to a state elections code must weigh:

> " 'the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate' against 'the precise interest put forward by the State as justifications for the burden imposed by its rule,' taking into consideration 'the extent to which those interests make it necessary to burden the plaintiff's rights.' " *Burdick v. Takushi*, 504 U.S. 428, 434, 112 S.Ct. 2059, 2063 (1992) (citing *Anderson*, 460 U.S. at 789, 103 S.Ct. at 1570).

The Supreme Court, therefore, has recognized that when those First and Fourteenth Amendment rights are

subjected to "severe" restrictions, the regulations must be "narrowly drawn to advance a state interest of compelling importance." *Id.* (citing *Norman v. Reed*, 502 U.S. 279, 289, 112 S.Ct. 698, 705 (1992)). However, when a state election law imposes only "reasonable, nondiscriminatory restrictions" upon the rights of voters, the state's important regulatory interests are generally sufficient to justify the restrictions. *Id.; Anderson*, 460 U.S. at 788, 103 S.Ct. at 1569-70.

Section 201's requirement that an individual be a registered voter, and therefore a resident of the state in order to be eligible as a candidate for an elective office does not place such a severe burden on the rights of the voters or candidates to require application of the strict scrutiny or compelling state interest standards to analyze the constitutionality of section 201. Elections Code Section 201 imposes only a limited burden on voter's rights to make free choices and to associate politically through the vote. It acts as a reasonable, non-discriminatory restriction on candidate eligibility. Therefore, the court will employ a balancing test in order to determine whether the state's asserted important regulatory interests are sufficient to justify the candidacy requirements of Section 201 and its application to Schaefer as a prospective candidate. The court will weigh the character and magnitude of Section 201's burden on those associational rights under the First and Fourteenth Amendments against the interests the state contends justifies that burden and consider the extent to which the state's concerns make the burden necessary. *See Timmons v. Twin Cities Area New Party*, ___ U.S. ___, 117 S.Ct. 1364, 1370 (1997).

In the instant case, the burden imposed by Section 201 on voters and potential candidates is two-fold. First, by being registered voters they must be residents of the State of California in order to participate in an election. However, this is not a heavy burden because the U.S. Constitution requires that in order to be qualified to serve as a United States Representative, an individual must be a resident of the state at the time the person is elected. Requiring residency at the time of candidacy instead of solely at the time a person is elected is not a great burden. Second, a candidate must be registered to vote. The registration process requires filing [sic] out and submitting a simple form to the registrar. There are no further requirements. Therefore, any burden that these restrictions place on potential candidates are minimal.

The Supreme Court has recognized that states have compelling interests in: (1) an orderly, fair, and honest election, rather than chaos, (2) maintaining the integrity of the political process by preventing interparty raiding, (3) avoiding voter confusion, ballot overcrowding, or the presence of frivolous candidates, and (4) seeking to ensure that elections are operated equitably and efficiently. *Term Limits,* 514 U.S. at 834-35, 115 S.Ct. at 1870. "In short we have approved of state regulations designed to ensure that elections are 'fair and honest and . . . that some sort of order, rather than chaos, . . . accompanies the democratic process." *Id.*

The state's justification for imposing the aforedescribed burdens is its interest in maintaining the integrity of its elections and the good order of its election processes by excluding frivolous candidates, i.e., those who do not have ties to the state and by precluding an

unreasonable multi-candidate ballot cluttered with persons who may not be residents of California at the time of their candidacy and one of whom after obtaining sufficient votes to be elected does not become a resident of California at the time she or he is elected, causing her or him to be not qualified under the U.S. Constitution to serve as a congressperson and thereby depriving the voters of being represented by the candidate they elected. The State of California's need to preserve the integrity and good order of its process far outweighs the burden of the eligibility requirement for a Congressional candidate to be a registered voter at the time nomination papers are requested from the county registrar.

Section 201 does not place an unconstitutional restriction on the associational rights of voters and candidates, as protected by the First and Fourteenth Amendments. Section 201 as applied by Townsend to Schaefer as a candidate seeking nomination papers for the special election to fill the vacancy in the 44th U.S. Congressional District is constitutional. Townsend's refusal, as Registrar of Voters, to give the nomination papers to Schaefer unless he submitted proof he was a registered voter in California did not violate Schaefer's constitutional rights.

To the extent any of the foregoing Conclusions of Law are deemed to be Findings of Fact, they are incorporated into the Findings of Fact in II. above.

2/20/98
DATE

/s/ Robert J. Timlin
ROBERT J. TIMLIN,
DISTRICT COURT JUDGE

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

MIKE SCHAEFER, Plaintiff, v. MICHELLE [sic] TOWNSEND, Registrar of Voters, BILL JONES, Secretary of State, Defendants.	ED CV 98-0033 RT (VAPx) JUDGMENT THIS CONSTITUTES NOTICE OF ENTRY AS REQUIRED BY FRCP, RULE 77(D).

The Court having entered Findings of Fact and Conclusions of Law on February 20, 1998, IT IS ADJUDGED AND DECREED that California Elections Code Section 201 as applied by defendant Michelle [sic] Townsend, Registrar of Voters, County of Riverside, California, to plaintiff Mike Schaefer, a candidate for nomination to fill the existing vacancy in the office of U.S. Congressperson for the 44th U.S. Congressional District is constitutional and such application does not violate his rights under the First and Fourteenth Amendments to the U.S. Constitution.

IT IS FURTHER ADJUDGED that judgment be entered in favor of defendants Michelle Townsend and Bill Jones against plaintiff Mike Schaefer on his claim for injunctive relief.

2/20/98
DATE

/s/ Robert J. Timlin
ROBERT J. TIMLIN
United States
District Court Judge

APPENDIX C – ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DENYING PETITION FOR REHEARING AND ACTION FOR REHEARING EN BANC

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MICHAEL SCHAEFER, Plaintiff – Appellant, v. MISCHELLE TOWNSEND, Registrar of Voters, County of Riverside; BILL JONES, Secretary of State, State of California, Defendants – Appellees.	No. 98-55718 D.C. No. CV-98-00033-RT ORDER

Before: PREGERSON, NOONAN, and O'SCANNLAIN, Circuit Judges.

The panel has unanimously voted to deny the petition for rehearing. Judge Pregerson and Judge O'Scannlain have voted to deny the petition for rehearing en banc. Judge Noonan so recommends. The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and the petition for rehearing en banc are DENIED.